Tg Intan Baidurah bt Tengku Abdullah v Raja Hamid bin Raja Kassim & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-254–07 OF 2020
ALICE LOKE J
12 NOVEMBER 2024

Civil Procedure — Judgments and orders — Impeachment — Whether judgment obtained by way of fraud — Whether court fraudulently misled into granting judgment — Whether affidavit in support of originating summons ('affidavit') ought to be looked at in its totality — Whether averments in affidavit were not to be construed literally — Whether there was fraud which led to judgment being decided — Whether there was laches on part of plaintiff — Whether plaintiff's suit to impeach judgment barred by laches

Land law — Caveat — Removal of caveat — Originating summons — Whether plaintiff failed to contest originating summons — Whether court correctly granted judgment for removal of caveat — Whether plaintiff appealed against decision of court — Whether plaintiff abandoned appeal — Whether plaintiff's action to set aside judgment devoid of merit — Whether defendant's counterclaim ought to be allowed

This case concerned a family dispute pertaining to a piece of land ('said land') that once belonged to Raja Kassim, now deceased. The first defendant ('D1') was the son of Raja Kassim, and the brother to Raja Salehudin. The plaintiff was Raja Salehudin's daughter in law. The said land was a land held in perpetuity and D1 was the registered owner of the said land. On 4 October 2004, both the plaintiff and D1 executed an agreement ('SPA') wherein it was stated that D1 agreed to sell to the plaintiff his half share of the said land. The consideration for the sale was stated as RM9,000. However, subsequent to the execution of the SPA, parties particularly the plaintiff, took no steps to give effect to the agreement by registering the plaintiff's/share of the said land on the title. Sometime in 2009, the plaintiff came to know of D1's intention to sell the said land. To protect her interest in the land, the plaintiff filed a caveat on the said land. D1 then sought to remove the caveat by filing an originating summons in the High Court. Judgment was given against the plaintiff who did not attend the hearing ('the judgment'). The plaintiff claimed that she was entitled to impeach the judgment on the grounds of fraud, and to have the judgment set aside on the grounds that D1 had affirmed untruths in his affidavit and hence given false testimony on oath. D1's conduct had induced the court to grant the reliefs in the judgment, inter alia, removing the plaintiff's

caveat. On the contrary, D1 in his counter claim pleaded for a declaration that the SPA was null and void. In addition, D1 sought for vacant possession of the said land now occupied by the plaintiff as well as rental from its occupation. The issues that arose for determination were: (a) whether the facts of the present case support the principle of impeachment of judgment to warrant setting aside of the judgment; (b) whether D1 had established by evidence that he was entitled to his counterclaim; and (c) whether there was undue delay on the plaintiff's part in filing this action.

Held, dismissing the plaintiff's claim and D1's counterclaim:

(1) The import of the paragraph of D1's affidavit in support of the originating summons had to be looked at in its totality and in the light of D1's explanation at the trial. D1admitted signing the SPA but in his evidence, he consistently maintained that he had no intention to sell his/share of the land. There was a quarrel between his father and him on the matter where his father threatened to leave the family home if he refused to sign. He gave in to his father's demand and signed without knowing what the contents were. As such, D1 was ambushed into signing the SPA. In the circumstances, the averments in the affidavit were not to be construed literally. D1's explanation in his oral evidence was to be given due consideration. Consequently, the court could not conclude that D1 committed fraud which led to the judgment being decided in his favour (see paras 39 & 42).

(2) The plaintiff did not contest the originating summons. She did not utilise the opportunity afforded her to contradict D1. She also did not make any attempt to set aside the judgment obtained in her absence. Instead, she now seized on the chance to use D1's affidavit against him to impeach the judgment. She had a further opportunity to appeal against the judgment, which she did not avail. The plaintiff was served with the judgment sometime in February 2011. She then filed a notice of motion in the Court of Appeal on 5 July 2011 seeking leave to extend time to file an appeal against the judgment of 6 April 2010. However, on the day of hearing, neither the plaintiff nor her counsel appeared. Thus, for all intents and purposes, the plaintiff was taken to have abandoned the appeal (see paras 43–44).

(3) The plaintiff's action to set aside the judgment was wholly devoid of merit and misconceived. The SPA was executed without the free will and consent of D1. In the circumstances, the court was not persuaded to grant the declaration that the SPA was valid and binding (see paras 45 & 47).

(4) The plaintiff was aware of the judgment as far back as February 2011. She filed the present suit to set aside the judgment only in 2020, some nine years later. There was clearly laches on her part. No explanation had been

proffered on the obvious delay. For someone who thought her case had merits, it was inexplicable on her part to have taken an inordinate time to file the present suit. The plaintiff had slept on her rights. The court ought not to come to her aid by condoning the delay. In view of this, the plaintiff's suit to impeach the judgment was clearly barred by laches (see paras 49 & 52).

(5) As for the relief pertaining to a declaration that the SPA was valid and binding for the purpose of seeking an order that D1 execute a memorandum of transfer, the SPA was dated 4 October 2004. The plaintiff filed the present suit in 2020, some 16 years after the execution of the agreement. Although D1 did not expressly mention the term 'time-bar' or 'limitation of action' in his defence, para 23.3. and 23.8 of the defence and counter claim sufficed in pleading a defence similar to limitation (para 53).

(6) Section 9 of the Limitation Act 1953 states the period of 12 years runs from the date on which the right of action accrued. The plaintiff pleaded that she had fully paid the sum of RM9,000 as purchase price. The SPA stated the same. Therefore, her right to demand that D1 execute the Form 14A would have accrued then. However, she took no such action to request him to do so until 16 years later by filing the instant suit. Her suit was now statute- barred (see paras 56–57).

(7) On issue of the letter from the land office, the plaintiff's reliance on the letter to contend the SPA was valid is totally misplaced. Contrary to the plaintiff's contention, the letter did not confirm the validity of the SPA. All that was stated was that the prepared plan was consistent with the terms of the agreement stipulating that the sale pertained to/share of said land. By no stretch of imagination could it be said that the land office confirmed that the SPA entered into between the plaintiff and D1 was valid. To do so would be going beyond the jurisdiction of the land office (para 60 & 62).

(8) Regarding D1's counterclaim, the declaration that the SPA was valid had been refused to the plaintiff. The relief by D1 in this regard was but a defence. Having succeeded in his defence, it was not necessary for a converse relief to be granted. As for the claim for vacant possession and rental, D1 did not appear to pursue these reliefs as there was no mention of these claims in the evidence adduced by D1 (see paras 64–66).

[Bahasa Malaysia summary

Kes ini melibatkan pertikaian keluarga berkaitan sekeping tanah ('tanah tersebut') yang dahulunya milik Raja Kassim, kini telah meninggal dunia. Defendan pertama ('D1') adalah anak kepada Raja Kassim, dan abang kepada Raja Salehudin. Plaintif adalah menantu Raja Salehudin. Tanah tersebut adalah tanah yang dipegang selama-lamanya dan D1 adalah pemilik berdaftar

tanah tersebut. Pada 4 Oktober 2004, kedua-dua plaintif dan D1 telah memasuki perjanjian ('SPA') di mana dinyatakan bahawa D1 bersetuju untuk menjual kepada plaintif separuh bahagian tanah tersebut. Balasan bagi penjualan tersebut dinyatakan sebagai RM9,000. Bagaimanapun, selepas pelaksanaan SPA, pihak-pihak khususnya plaintif tidak mengambil langkah untuk melaksanakan perjanjian dengan mendaftarkan plaintif/bahagian tanah tersebut pada hak milik. Pada tahun 2009, plaintif mendapat tahu tentang hasrat D1 untuk menjual tanah tersebut. Untuk melindungi kepentingannya dalam tanah itu, plaintif memfailkan kaveat ke atas tanah tersebut. D1 kemudiannya memohon untuk mengeluarkan kaveat itu dengan memfailkan saman pemula di Mahkamah Tinggi. Penghakiman telah diberikan terhadap plaintif yang tidak menghadiri perbicaraan ('penghakiman'). Plaintif mendakwa bahawa dia berhak untuk menolak penghakiman atas alasan penipuan, dan mengetepikan penghakiman atas alasan bahawa D1 telah mengesahkan perkara yang tidak benar dalam afidavitnya dan dengan itu memberikan keterangan berakuan palsu. Kelakuan D1 telah mendorong mahkamah untuk memberikan relif dalam penghakiman, antara lain, mengeluarkan kaveat plaintif. Sebaliknya, D1 dalam tuntutan balasnya memplidkan pengisytiharan bahawa SPA adalah terbatal dan tidak sah. Di samping itu, D1 memohon milikan kosong ke atas tanah tersebut yang kini diduduki oleh plaintif serta sewa atas kedudukannya. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada fakta kes ini menyokong prinsip penolakan penghakiman untuk mewajarkan mengenepikan penghakiman; (b) sama ada D1 telah membuktikan melalui keterangan bahawa dia berhak kepada tuntutan balasnya; dan (c) sama ada terdapat kelewatan yang tidak wajar di pihak plaintif dalam memfailkan tindakan ini.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas D1:

(1) Pengambilan perenggan afidavit D1 untuk menyokong saman pemula perlu dilihat secara keseluruhannya dan berdasarkan penjelasan D1 semasa perbicaraan. D1 mengaku menandatangani SPA tetapi dalam keterangannya, dia secara konsisten menegaskan bahawa dia tidak berniat untuk menjual/bahagian tanahnya. Terdapat pertengkaran antara bapanya dan dia mengenai perkara di mana bapanya mengugut untuk meninggalkan rumah keluarga jika dia enggan menandatangani. Dia akur dengan permintaan ayahnya dan menandatangani tanpa mengetahui apa isi kandungannya. Oleh itu, D1 telah dipaksa untuk menandatangani SPA. Dalam keadaan itu, penegasan dalam afidavit tidak boleh ditafsirkan secara literal. Penjelasan D1 dalam keterangan lisannya perlu diberi pertimbangan sewajarnya. Akibatnya, mahkamah tidak dapat membuat kesimpulan bahawa D1 melakukan penipuan yang menyebabkan penghakiman diputuskan memihak kepadanya (lihat perenggan 39 & 42).

(2) Plaintif tidak membantah Saman Pemula. Dia tidak menggunakan

peluang yang diberikan kepadanya untuk menentang D1. Dia juga tidak membuat sebarang percubaan untuk mengenepikan penghakiman yang diperoleh semasa ketiadaannya. Sebaliknya, dia kini merebut peluang untuk menggunakan afidavit D1 terhadapnya untuk menolak penghakiman. Dia mempunyai peluang lagi untuk merayu terhadap penghakiman itu, yang dia tidak berjaya. Plaintif telah disampaikan dengan penghakiman pada Februari 2011. Beliau kemudiannya memfailkan notis usul di Mahkamah Rayuan pada 5 Julai 2011 memohon kebenaran melanjutkan masa untuk memfailkan rayuan terhadap penghakiman pada 6 April 2010. Bagaimanapun, pada hari tersebut pendengaran, baik plaintif mahupun peguamnya tidak hadir. Oleh itu, untuk semua maksud dan tujuan, plaintif telah dianggap telah meninggalkan rayuan (lihat perenggan 43–44).

(3) Tindakan plaintif untuk mengenepikan penghakiman adalah tidak tanpa merit dan salah arah. SPA telah dilaksanakan tanpa niat dan persetujuan D1. Dalam keadaan itu, mahkamah tidak diyakinkan untuk memberikan pengisytiharan bahawa SPA adalah sah dan mengikat (lihat perenggan 45 & 47).

(4) Plaintif menyedari penghakiman itu seawal Februari 2011. Dia memfailkan saman semasa untuk mengetepikan penghakiman hanya pada 2020, kira-kira sembilan tahun kemudian. Jelas terdapat laches di pihaknya. Tiada penjelasan telah dikemukakan mengenai kelewatan yang jelas. Bagi seseorang yang menganggap kesnya mempunyai merit, ia adalah tidak dapat dijelaskan di pihaknya untuk mengambil masa yang terlalu lama untuk memfailkan saman semasa. Plaintif telah tidur atas haknya. Mahkamah tidak sepatutnya membantunya dengan membantunya dengan membenarkan kelewatan tersebut. Memandangkan ini, saman plaintif untuk menolak penghakiman jelas dihalang oleh sekatan (lihat perenggan 49 & 52).

(5) Bagi relif yang berkaitan dengan pengisytiharan bahawa SPA adalah sah dan mengikat bagi tujuan mendapatkan perintah supaya D1 melaksanakan memorandum pindahmilik, SPA bertarikh 4 Oktober 2004. Plaintif memfailkan saman semasa pada tahun 2020, kira-kira 16 tahun selepas pelaksanaan perjanjian itu. Walaupun D1 tidak menyebut secara jelas istilah 'time-bar' atau 'limitation of action' dalam pembelaannya, perenggan 23.3. dan 23.8 pembelaan dan tuntutan balas mencukupi dalam membuat pembelaan yang serupa dengan had (perenggan 53).

(6) Seksyen 9 Akta Had Masa 1953 menyatakan tempoh 12 tahun bermula dari tarikh hak tindakan terakru. Plaintif memplidkan bahawa dia telah membayar sepenuhnya jumlah RM 9,000 sebagai harga belian. SPA menyatakan perkara yang sama. Oleh itu, haknya untuk menuntut D1 untuk melaksanakan Borang 14A akan terakru pada masa itu.

Bagaimanapun, dia tidak mengambil tindakan sedemikian untuk memintanya berbuat demikian sehingga 16 tahun kemudian dengan memfailkan saman semasa. Samannya kini dihalang oleh undang-undang (lihat perenggan 56–57).

(7) Mengenai isu surat daripada pejabat tanah, pergantungan plaintif terhadap surat itu untuk menyatakan SPA adalah sah adalah salah arah sama sekali. Bertentangan dengan hujah plaintif, surat itu tidak mengesahkan kesahihan SPA. Apa yang dinyatakan ialah pelan yang disediakan adalah selaras dengan terma perjanjian yang menyatakan bahawa penjualan adalah berkaitan dengan/bahagian tanah tersebut. Tanpa sebarang imaginasi boleh dikatakan bahawa pejabat tanah mengesahkan bahawa SPA yang dibuat antara plaintif dan D1 adalah sah. Untuk berbuat demikian akan melangkaui bidang kuasa pejabat tanah (perenggan 60 & 62).

(8) Berkenaan tuntutan balas D1, pengisytiharan bahawa SPA adalah sah telah dinafikan kepada plaintif. Relif oleh D1 dalam hal ini hanyalah pembelaan. Setelah berjaya dalam pembelaannya, ia tidak perlu untuk pelepasan dibenarkan. Bagi tuntutan untuk milikan kosong dan penyewaan, D1 nampaknya tidak meneruskan relif ini kerana tidak ada sebutan mengenai tuntutan ini dalam keterangan yang dikemukakan oleh D1 (lihat perenggan 64–66).]

Cases referred to

IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor [2022] 1 MLJ 860, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (folld)

Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102
Limitation Act 1953 ss 9, 32
National Land Code s 327, Form 14A

Mohd Hisham bin Mohd Nen (Hisham Nen & Co) for the plaintiff.
Mohd Din Gilaldin Khan (Din & Assoc) for the first defendant.
Mohd Abdul Hakim b Mohd Ali (Selangor State Legal Advisor's Office) for the second defendant.

Alice Loke J:

INTRODUCTION

[1] On 6 April 2010, the first defendant obtained judgment against the plaintiff in a suit he filed vide Originating Summons No 21–268 of 2009 in the Shah Alam High Court. The suit was to principally set aside a caveat entered by the plaintiff in respect of a piece of land registered in the first defendant's name. Judgment was given against the plaintiff who did not attend the hearing.

[2] The plaintiff claims that the judgment was obtained by fraud on the part of the first defendant as he affirmed to matters which were false in his affidavit in support of the originating summons.

[3] She now seeks to, inter alia, set aside the judgment obtained against her on 6 April 2010, and various other reliefs in the nature of declarations and orders.

[4] The second defendant is the Land Administrator. No cause of action is pleaded against the second defendant who is merely cited as a co-defendant for the purpose of giving effect to any judgment/order obtained by the plaintiff in these proceedings.

SALIENT FACTS

[5] This case concerns a family dispute pertaining to a piece of land that once belonged to Raja Kassim, now deceased. The first defendant ('D1') is the son of Raja Kassim, and the brother to Raja Salehudin. The plaintiff is Raja Salehudin's daughter in law.

[6] The land in question is identified as Lot 297, Mukim Jugra, Kampung Permatang Pasir, Banting, Kuala Langat 42700 Selangor ('said land'). The said land measures 0.1568 hectares in size and it is a land held in perpetuity. D1 is the registered owner of the said land.

[7] On 4 October 2004, both the plaintiff and D1 executed an agreement wherein it was stated that D1 agreed to sell to the plaintiff his half (1/2) share of the said land. Although the agreement is not in the usual form nor its contents that ordinarily seen in a sale and purchase of a property, I shall nonetheless refer to it as 'the SPA'.

[8] The consideration for the sale was stated as RM9,000. The SPA duly signed by the parties is reproduced below:

A

B

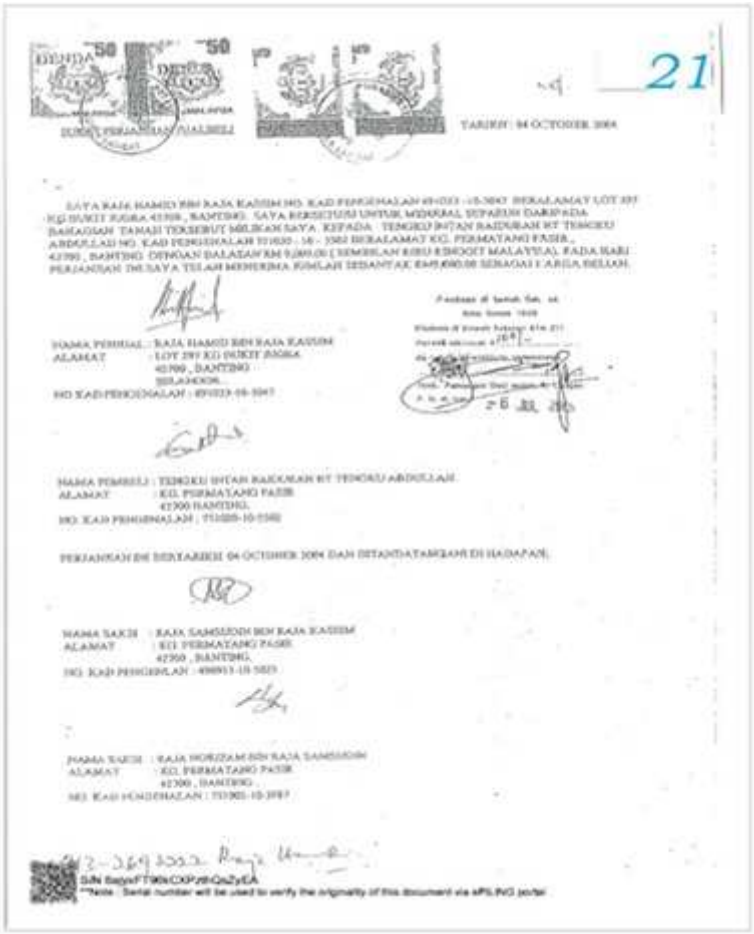
C

D

E

F

G



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[9] However, subsequent to the execution of the SPA, parties particularly the plaintiff, took no steps to give effect to the agreement by registering the plaintiff's 1/2 share of the said land on the title.

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[10] Sometime in 2009, the plaintiff came to know of D1's intention to sell the said land. To protect her interest in the land, the plaintiff filed a caveat on 28 July 2009 on the said land vide presentation No 1343/2009. D1 then sought to remove the caveat by filing an Originating Summons No 21–268 of 2009 in the Shah Alam High Court for the said purpose.

[11] The matter came up for hearing on 6 April 2010. The plaintiff was not present at the hearing in spite of having been served with the cause papers. The

High Court gave judgment in favour of D1 ('the judgment'), who was the plaintiff in that suit. The plaintiff here was cited as the co-defendant together with the Land Administrator.

[12] As the reliefs issued in the judgment are material, I shall reproduce them as follows:

1. Bahawa kaveat persendirian yang dimasukkan oleh Defendan Pertama pada 28 hari bulan Julai 2009 melalui perserahan No 1343/2009 pejabat Pentadbir Tanah Kuala Langat dibatalkan dengan serta-merta;
2. Bahawa Defendan Pertama tidak mempunyai locus standi untuk memasukkan kaveat persendirian terhadap hartanah milik Plaintif;
3. Bahawa Defendan Pertama tidak langsung mempunyai kepentingan dalam hartanah milik Plaintif;
4. Bahawa hartanah yang telah di kaveat oleh Defendan Pertama bukanlah tanah pusaka tetapi milik Plaintif;
5. Bahawa Defendan Kedua dalam masa tiga puluh (30) hari dari tarikh perintah bermeterai disampaikan kepada Defendan Kedua membatalkan kaveat persendirian dalam daftar milik hartanah milik Plaintif yang dipegang di bawah GM 47, Lot 297, Mukim Jugra, Daerah Kuala Langat, Negeri Selangor.

[13] The plaintiff now claims that the judgment was obtained as a result of fraud perpetrated by D1. In his affidavit in support of the originating summons, D1 had averred to false and incorrect facts. Firstly, D1 denied he agreed to sell his 1/2 share of the land to the plaintiff. Secondly, D1 denied executing any agreement to sell part of his land to the plaintiff. Thirdly, D1 denied receiving the consideration sum of RM9,000 in respect of the sale of the land.

THE PLAINTIFF'S CASE

[14] In view of the foregoing matters, the plaintiff claims that she is entitled to impeach the judgment of 6 April 2020 on the grounds of fraud, and to have the judgment set aside. D1 had affirmed untruths in his affidavit and hence given false testimony on oath. His conduct had induced the court to grant the reliefs in the judgment, inter alia removing the plaintiff's caveat.

[15] The plaintiff also claims that after she was served with the originating summons, parties had arrived at an understanding that the dispute pertaining to the caveat entered by her would be settled amicably between them.

[16] On the basis of family ties and D1's representation that the dispute between them can be amicably settled, she did not enter any appearance to the

originating summons. Unfortunately, her stance led to an outcome she did not intend.

[17] She was therefore shocked to find out that the judgment had been entered against her. She received notice of the judgment when it was served on her on 11 February 2011.

[18] In addition, there were facts to confirm the existence and validity of the SPA and the agreement to sell D1's 1/2 share of the said land to her. She had commissioned a land surveyor one Idris Syawal, to draw a plan of the said land. The plan he drew showed the land to be divided into two plots named Plot A and Plot B. Plot A was the plaintiff's lot, and D1's was Plot B. The said plan was submitted to the Kuala Langat district land office together with the SPA.

[19] By a letter dated 24 January 2020, the land office confirmed the boundaries of both plots and found the SPA to be valid. At the date of the judgment on 6 April 2010, the High Court was not apprised of letter by the land office on 24 January 2020 which would have affected the outcome of the originating summons. I shall deal with the letter and its import in greater detail as it is heavily relied on by the plaintiff.

[20] She now seeks the following reliefs:

(a) an order to set aside the judgment dated 6 April 2010;

(b) a declaration that the SPA dated 4 October 2004 is valid and binding on the parties;

(c) a declaration that the demarcation of the said land into Plot A and Plot B according to the surveyor's plan No JIS 1827/DEM/2020/K.LGT/L287 is valid and binding on plaintiff and D1;

(d) an order that within 14 days of the order to be made herein, plaintiff and D1 execute a memorandum of transfer in Form 14A transferring the 1/2 share of the said land to the plaintiff;

(e) alternatively, if D1 fails to execute the Form 14A, the Registrar of the High Court is authorised to do so on his behalf in favour of the plaintiff; and

(f) costs of this action.

DEFENCE OF D1

[21] The entire claim of the plaintiff is disputed by D1. He contends that he did not consent to sell his 1/2 share of the said to the plaintiff. He explained

that the said land was once owned by his late father. It given as security to one Er Poh Seng for a loan taken by his brother. When the loan could not be repaid, the said land became the property of Er Poh Seng.

[22] D1 then worked hard to raise money in order to redeem the said land from Er Poh Seng. He finally succeeded in purchasing the said land in 2001. He became the registered owner of the said land on 20 November 2001.

[23] He denied being engaged in any discussion pertaining to the sale of the said land. He had no intention to sell his 1/2 share as he intended to use it for his growing family. He claims that the plaintiff had cleverly wormed her way into getting D1's late father to agree to give 1/2 of the said land to her. This led to frequent fights between D1 and his father who then pressured him to sign a document against his will. He later came to know it was the SPA to sell his 1/2 share of the said land. However, he did not receive the RM9,000 stated in the agreement.

[24] He further denied having made false averments in the affidavit in support of the originating summons. The statements therein have been misconstrued by the plaintiff. The import of his averments was that he did not willingly sell his 1/2 share of the land as he was pressured into so doing by his late father. He has been consistently maintaining that position.

[25] He also contends that the plaintiff has no legal basis to maintain the present action for the following reasons. Firstly, there was no fraud committed to cause the issuance of the judgment. Secondly, the plaintiff failed to file an appeal upon being served with the judgment. Thirdly, there was an unreasonable delay in pursuing her remedies.

[26] D1 also denies that the plaintiff is entitled to the registration of her 1/2 share in the said land on the same grounds of undue delay. The present suit was filed some 16 years after the SPA. The doctrine of laches applies to defeat her claim.

[27] Apart from the aforesaid contention, D1 claims that the plaintiff had been occupying part of the said land as she stayed in the house built by his late father.

[28] D1 counterclaims in turn the following reliefs:

(a) the sale and purchase agreement dated 4 October 2004 is null and void;

(b) an order that the plaintiff surrenders vacant possession of the portion of the land presently occupied by her within 14 days of the order to be granted by this court;

(c) the plaintiff to pay rental of RM500 per month from 20 November 2001 until 31,2009 and thereafter RM1000 from 1 January 2010 until vacant possession is delivered to D1; and

(d) costs of these proceedings.

ISSUES FOR DETERMINATION

[29] From the contention of the parties, I find the issues for determination are quite confined. They are as follows:

(a) whether the facts of the present case support the principle of impeachment of judgment to warrant setting aside of the judgment of 6 April 2010;

(b) whether there is undue delay on the plaintiff's part in filing this action; and

(c) whether D1 has established by evidence that he is entitled to his counterclaim.

ANALYSIS AND DECISION OF THIS COURT

[30] It is law well established that the plaintiff bears the onus of proving its claim and the parties asserting the existence of a fact bears the burden of proving that fact (see: ss 101 and 102 of the Evidence Act 1950 and *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418).

Whether the evidence and facts of the present case support the application of the principle of impeachment of judgment

[31] The plaintiff contends that the facts as they exist, entitles her to impeach the judgment of 6 April 2010. In support thereof, she relies on s 44 of the Evidence Act 1950 and the principle in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1.

[32] The applicable principles are well enunciated in the judgment of the Federal Court and I am guided by the judgment, the relevant passages of which are set out below:

> The law recognises this type of cause of action. Section 44 of the Act provides that 'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion'. This provision is an exception to the doctrine of res judicata as provided for under s 40 of the same Act.

The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31*, relying on English authorities of Cole v Langford* [1898] 2 QB 36; *Priestman v Thomas* [1884] 9 PD 270; *Duches of Kingston's Case 2 Smith LC* (13th Ed) 644 and *Patch v Ward* (1867) LR 3 Ch App 203, ruled that, 'The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing'.

The same principle was adopted by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FCJ ruled that '... *if a judgment or order has been obtained by fraud* or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, *a fresh action will lie to impeach the original judgment* ...'

The case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that *the allegation of fraud must be established by evidence*, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.

In another case, *Seng Huat Hang Sdn Bhd* Edgar Joseph Jr J (later FCJ) cited Herring CJ in *Mcharg v Woods Radio Pty Ltd* [1948] VLR 496, held, inter alia, that 'as in all other actions based on fraud, particulars of the fraud must be exactly given and the allegation established by the strict proof that such a charge requires'.

In *Satish Chandra v Satish Kantha Roy AIR* 1923 PC 73 at p 76 (as cited in *Chee Pok Choy*), it was also held that '*Charges of fraud* and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them — *proved by established facts or inferences legitimately drawn from those facts taken together as a whole*'. We must add that proof can only be established by way of evidence during trial.

...

Our view is that the *fraud of which s 44 of the Act speaks refers to an actual fraud* and not constructive fraud ie fraud practised by the other side must have prevented the respondents from placing their case before the court.

The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance (see *Patch v Word*).

The earlier judgment cannot be impeached or set aside on a mere general allegation of fraud. It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed (Emphasis added.)

[33] The requirements to succeed in an impeachment action are thus this; the action to set aside the earlier judgment must be commenced by a fresh

action, if fraud is relied on as a ground, it must be actual fraud and not constructive fraud, and finally, fraud must be established by evidence.

[34] I shall also add that the proof of fraud in a civil case, is on a balance of probabilities (see: *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd*).

[35] Bearing in mind the principles for an action pursuant to s 44 of the Evidence Act, I am of the view that the plaintiff fails for the following reasons.

[36] The plaintiff refers to D1's affidavit affirmed on 29 August 2009 in support of the originating summons in which he avers:

> 9. Seterusnya Defendan Pertama menyebut dalam Surat Akuan '... kami telah membuat surat perjanjian ...'. Saya tidak pernah membuat apa-apa perjanjian dengan Defendan Pertama tetapi pada pendapat saya perjanjian yang dimaksudkan adalah Surat Perjanjian Jual Beli bertarikh 4/10/2004 yang ditandakan sebagai ekshibit 'RHRK-3'. Surat perjanjian tersebut telah diberi kepada saya pada 2/07/2009 untuk ditandatangani. Setelah saya meneliti surat perjanjian tersebut saya mendapati bahawa abang saya Raja Samsudin Bin Raja Kassim ingin merampas separuh tanah milik saya kerana tiada apa-apa pun perbincangan atau tawaran daripada mereka sebelum dokumen diberi kepada saya untuk ditandatangani dan seterusnya tidak menandatangani surat perjanjian tersebut.

[37] In para 10 of the same affidavit, D1 further stated:

> 10 ... Saya telah melihat surat tersebut kali pertama pada hari itu dan menyatakan dengan setegas-tegasnya bahawa saya tidak pernah menandatangani surat perjanjian itu dan tandatangan saya dalam surat perjanjian itu adalah palsu. Saya tidak pernah menerima balasan daripada sesiapa pun sebagai harga jualan separuh tanah saya. Defendan Pertama serta keluarganya tinggal di tanah milik saya secara percuma tetapi sebagai balasan ihsan terhadap mereka, mereka ingin merampas tanah saya.

[38] Premised on the above averments, the plaintiff contends those statements made by D1 are false as he had in fact executed the agreement 4 October 2004. To say he did not, is fraud on his part.

[39] I am of view that firstly, the import of the paragraph has to be looked at in its totality and in the light of D1's explanation at the trial. Before this court, he admitted signing the SPA. However, in his evidence, he consistently maintained that he had no intention to sell his 1/2 share of the land. There was a quarrel between his father and him on the matter on 4 October 2004 when he

returned from work. His father threatened to leave the family home if he refused to sign. He gave in to his father's demand and signed without knowing what the contents were.

[40] The statement that D1 did not enter into agreement to sell the said land nor execute the SPA must be understood in its proper context, and not taken in isolation. After hearing his evidence, I find that what D1 meant was that he did not willingly enter into any agreement to sell his land. There was no prior discussion on the sale and he felt that his brother and his nephew (the plaintiff's husband) wanted to wrest the said land from him.

[41] As the said land was purchased from Er Poh Seng with his own monies and monies he borrowed, he was not willing to part with any portion of it. He was compelled to do so in view of the circumstances he faced, especially his late father's character. It would appear that he was ambushed into signing the SPA. Having observed D1 at the trial, I have no reason to disbelieve his evidence. I find his explanation to be credible. He also called his sibling (DW2) and another relative (DW3) who both testified as to his late father being a hot-tempered person.

[42] In the circumstances, and upon considering the evidence presented before me, I find that the averments in the affidavit are not to be construed literally. D1's explanation in his oral evidence is to be given due consideration. Consequently, I would be slow to conclude that D1 committed fraud which led to the judgment being decided in his favour.

[43] There is also one telling fact against the plaintiff. The plaintiff did not contest the originating summons. She did not utilize the opportunity afforded her to contradict him. She also did not make any attempt to set aside the judgment obtained in her absence. Instead, she now seizes on the chance to use D1's affidavit against him to impeach the judgment.

[44] She had a further opportunity to appeal against the judgment, which she did not avail. By her own admission, she was served with the judgment sometime in February 2011. She then filed a notice of motion in the Court of Appeal on 5 July 2011 seeking leave to extend time to file an appeal against the judgment of 6 April 2010. However, on the day of hearing, neither the plaintiff nor her counsel appeared. Thus, for all intents and purposes, the plaintiff is taken to have abandoned the appeal.

[45] For the above reasons, I find the plaintiff's action to set aside the judgment of 6 April 2010 to be wholly devoid of merit and misconceived.

[46] In any event, the judgment of 6 April 2010 was only in respect of an

application to set aside the caveat entered by the plaintiff. The originating summons was filed for the purpose of removing the caveat entered. The intitulement of the suit was clear as to the cause of action, having cited s 327 of the National Land Code.

[47] In the present suit, apart from seeking to set aside the judgment of 6 April 2010, she seeks for a declaration that the SPA is valid and binding, and a consequential order that D1 execute a Form 14A transferring 1/2 share of the said land to her. This is clearly a different cause of action, which the plaintiff has to prove by establishing evidence on her right to the land. Having weighed the evidence adduced by both parties on a balance of probabilities, I find a preponderance of evidence to conclude that the SPA was executed without the free will and consent of D1. In the circumstances, I am not persuaded to grant the declaration that the SPA is valid and binding.

Whether there is undue delay on the plaintiff's part in filing this action

[48] Apart from the obligation to adduce the necessary evidence to establish her case, the plaintiff faces a legal impediment which to my mind, is insurmountable. This pertains to the issue of delay on her part in pursuing her claim.

[49] The plaintiff was aware of the judgment as far back as February 2011. She filed the present suit to set aside the judgment only in 2020, some nine years later. There is clearly laches on her part. No explanation has been proffered on the obvious delay.

[50] In *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor* [2022] 1 MLJ 860, the Court of Appeal held as follows:

> [290] In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693, Edgar Joseph Jr J (as he then was) said that laches was 'inaction with one's eyes open'. At p 237 of the judgment he said:
>
> > Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time.
> >
> > He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant.
> >
> > The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which

it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open.

[291] More recently, in *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; [2017] 1 LNS 622 the Court of Appeal per Abdul Rahman Sebli JCA (as he then was) expressly endorsed the observations of Hashim Yeop Sani J in *Yong Nyee Fan*'s case.

[292] The Court of Appeal said:

[44] In any event the respondents were guilty of laches. In *The Principles of Equitable Remedies* (2001) (6th Ed), the learned authors have this to say on the common law doctrine of laches:

> Laches is established when *two conditions are fulfilled*. In the first place, *there must be unreasonable delay in the commencement or prosecution of proceedings*; in the second place, in all the circumstances *the consequences of delay must render the grant of relief unjust*.

[45] In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182; [1978] 1 LNS 244* the Federal Court made the following observations:

> To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For laches literally means negligent inactivity.
>
> ...

[51] Under s 32 of the Limitation Act, the court of equity is allowed to refuse relief on the ground of acquiescence or laches. The section reads as follows:

> 32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[52] Premised on the principles on laches succinctly stated in the above cases, I find the plaintiff has been indolent and failed to pursue her rights within a reasonable time. For someone who thought her case had merits, it was inexplicable on her part to have taken an inordinate time to file the present suit. I consider her to have slept on her rights. The court ought not to come to her aid by condoning the delay. In view of this, I find her suit to impeach the judgment is clearly barred by laches.

[53] As for the relief pertaining to a declaration that the SPA was valid and binding for the purpose of seeking an order that D1 execute a Memorandum of Transfer, the SPA was dated 4 October 2004. The plaintiff filed the present suit in 2020, some 16 years after the execution of the agreement. Although D1 did not expressly mention the term 'time-bar' or 'limitation of action' in his

defence, I am of the view that the para 23.3. and 23.8 of the defence and counterclaim suffices in pleading a defence similar to limitation.

[54] Section 9 of the Limitation Act 1953 provides for a 12-year limitation of actions to recover land. The factual matrix of the present case is similar to that of *Nasri v Mesah* [1971] 1 MLJ 32, where the plaintiff therein seeks for an order that the defendant execute Form 14A. The court held that such an action falls within the meaning of the phrase 'an action to recover land' in s 9.

[55] The Federal Court opined as follows:

> In the present action the plaintiff's prayer was for an order that the defendant do execute a valid and registrable transfer of the land. In other words, he was asking for specific performance of the agreement as in *Ng Moh's case* [1969] 1 MLJ 46. But what in effect he was seeking to do was to obtain the land by a judgment of the court. It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[56] The next question to consider is when does the time begin to run. Section 9 states the period of 12 years runs from the date on which the right of action accrues. A right of action or a cause of action is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (see: *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749).

[57] The plaintiff pleads that she had fully paid the sum of RM9,000 as purchase price. The SPA states the same. Therefore, her right to demand that D1 execute the Form 14A would have accrued then. However, she took no such action to request him to do so until 16 years later by filing the instant suit. Her suit is now statute-barred.

The land office letter of 24 January 2020

[58] For the sake of completeness, I will also deal with one other piece of evidence relied on by the plaintiff to contend that there was confirmation by the land office that the SPA was valid based on its letter dated 24 January 2020.

[59] The plaintiff's surveyor had prepared a plan of the said land comprising of Plot A and Plot B. Both the plots of land are almost of the same size, each having an area of about 0.075 hectares. Having perused the plan, the technical officer from the district land office of Kuala Langat then stated in its letter as follows:

2. Semakan pentadbiran ini berdasarkan Surat Perjanjian Jualbeli bertarikh 4 Oktober 2004 di antara Raja Hamid Bin Raja Kassim (691023–10–5047) (sebagai penjual) dengan Tengku Intan Baidurah Binti Tengku Abdullah (751020–10–5507) (sebagai pembeli) adalah disahkan benar seperti pelan pra-hitungan pecah bahagian yang telah dijalankan oleh Jurukur Idris Shawal.

3. Pengesahan kedudukan Plot A & Plot B dalam pelan pra-hitungan pecah bahagian (JIS1827/DEM/2020/K.LGT/1287), adalah berdasarkan perjanjian jualbeli yang menyatakan syer masing-masing adalah separuh bahagian tanah tersebut. Pelan Precom tersebut juga telah disahkan kedudukannya oleh Penolong Pegawai Tanah, Unit Teknikal & Penguatkuasaan, Pejabat Daerah/Tanah Kuala Langat.

[60] Contrary to the plaintiff's contention, I do not find the letter to have confirmed the validity of the SPA. All that was stated was that the prepared plan was consistent with the terms of the agreement stipulating that the sale pertained to 1/2 share of said land. By no stretch of imagination can it be said that the land office confirmed that the SPA entered into between the plaintiff and D1 was valid. To do so would be going beyond the jurisdiction of the land office.

[61] The second defendant's statement of defence further clarified the matter when it denied the alleged construction given to the letter by the plaintiff as it has no jurisdiction to do so.

[62] To conclude the issue on the letter from the land office, the plaintiff's reliance on the letter to contend the SPA is valid is totally misplaced.

[63] For the same reasons, the relief sought that the demarcation of the said land into Plot A and Plot B according to the surveyor's plan is binding on both the plaintiff and D1, has no merit. It is not allowed.

Whether D1 is entitled to his counterclaim

[64] In his counterclaim, D1 pleaded for a declaration that the SPA of 4 October 2004 is null and void. In addition, D1 seeks for vacant possession of the said land now occupied by the plaintiff as well as rental from its occupation.

[65] The declaration that the SPA is valid has been refused to the plaintiff, upon hearing the evidence by both parties. The relief by D1 in this regard is but a defence. Having succeeded in his defence, I do not find it necessary for a converse relief to be granted.

[66] As for the claim for vacant possession and rental, D1 does not appear to pursue these reliefs as there was no mention of these claims in the evidence

A adduced by D1. The evidence in the witness statement of D1 appears to disavow any claim on vacant possession. In response to the question whether he had ever demanded for the plaintiff to vacate the said land from the time he successfully obtained the order to remove the plaintiff's caveat, he stated 'Tidak. Saya tidak sampai hati berbuat demikian kerana mereka adalah
B keluarga'.

[67] In the circumstances, the counterclaim is not established and I would therefore disallow the claim.

C CONCLUSION

[68] Premised on the foregoing reasons, I make the following orders:

(a) the plaintiff's claim against both the defendants is dismissed;

D (b) the counterclaim of the first defendant against the plaintiff is also dismissed;

(c) costs of RM15,000 is ordered to be paid by the plaintiff to the first defendant; and

E (d) costs of RM10,000 is ordered to be paid by the plaintiff to the second defendant.

Plaintiff's claim and defendant's counterclaim dismissed.

F Reported by K Selvaraju

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